

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1205

NO. 77-1250

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARK FREDERICK BUTHORN,
Appellant

V.

UNITED STATES OF AMERICA
Appellee

On Appeal From The
Southern District of New York

APPELLANT'S PETITION FOR REHEARING IN BANC

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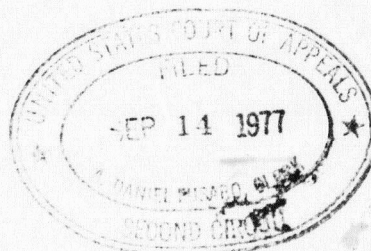


TABLE OF AUTHORITIES

CASES	Page
<u>Boyd v. United States</u> 141 U.S. 450 (1892)	14
<u>Estepa v. United States</u> 471 F2d 1132 (2d Cir. 1972)	16
<u>Sunderland v. United States</u> 19 F2d 202 (8th Cir. 1927)	4
<u>United States v. Cassiagno1</u> 420 F2d 468 (4th Cir. 1970)	8
<u>United States v. Coke</u> 339 F2d 183 (2d Cir. 1964)	4,8
<u>United States v. Cole</u> 491 F2d 1276 (4th Cir. 1970)	8
<u>United States v. Davenport</u> 449 F2d 696 (5th Cir. 1971)	14
<u>United States v. Kelley</u> 314 F2d 461 (6th Cir. 1963)	8
<u>Young v. United States</u> 346 F2d 793 (D.C. Cir. 1965)	4,8
STATUTES	
Title 18, U.S.C. § 1001	Appendix A
Title 18, U.S.C. § 2(b)	Appendix A
RULES	
Rule 403, F.R.Cr. P.	13

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. THE TRIAL COURT ERRED IN REPEATEDLY HURRYING, BELITTling AND BADGERING DEFENSE COUNSEL, THEREBY DEPRIVING THE APPELLANT OF A FAIR AND IMPARTIAL TRIAL AND DUE PROCESS OF LAW	4
II. THE TRIAL COURT ERRED BY ALLOWING IMPEACHMENT OF THE APPELLANT WITH EVIDENCE OF A CIVIL SETTLEMENT OF A MEDICARE CLAIM AGAINST HIM, WHICH SERVED ONLY TO PREJUDICE AND CONFUSE THE JURY	9
III. THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE TRANSCRIPT OF TESTIMONY BEFORE THE GRAND JURY DOES NOT REVEAL ANY INSTRUCTION THAT ITS MEMBERS COULD SUBPOENA WITNESSES WHO HAD FIRST- HAND KNOWLEDGE	15
CONCLUSION	17
CERTIFICATE OF SERVICE	
APPENDIX	20
A. Statutes	a
B. Indistment	b
C. Index to Record on Appeal	c
D. Affidavit of JoAnn Harris	d
E. Docket Sheet	e
F. Opinion of the Panel (<u>per curiam</u>)	f

MARK FREDERICK BUTHORN

Appellant

V.

DOCKET NO. 77-1205

UNITED STATES OF AMERICA

Appellee

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The Appellant was convicted on 21 counts of violating Title 18, U.S.C. § 1001 and 2. His first trial ended in a hung jury and mistrial on July 17, 1976. The trial was conducted in the Southern District of New York, Judge Charles L. Brieant presiding. The Appellant was sentenced to serve four years in jail on March 16, 1977, and on August 18, 1977, a three judge panel of this circuit affirmed his conviction from the bench (see attached).

STATEMENT OF FACTS

During the period of April, 1971 through August, 1972, Dr. Mark F. Buthorn, Jr., then a 30 year old podiatrist, practiced in a health clinic located in the Bronx, New York City. In the course of his treatment of many patients, Dr. Buthorn filled out and submitted to the New York City Department of Social Services their payment forms entitled "Invoices for Doctor's Services."

The forms contained no reference to any governmental agency other than the New York City Department of Social Services. Payments, by check, were from the same agency directly to Dr. Buthorn. Acceptance or disallowance of the claims were determined solely by the city agency.

The essential allegation against Appellant was that the invoices he submitted for services rendered under the Medicaid program were false. The government produced several witnesses who testified that the Appellant, a foot doctor, had not administered some of the treatment for which invoices were submitted.

The trial became a question of credibility inasmuch as the Appellant testified that all such services claimed were in fact rendered.

The critical period of time involved is the period Appellant worked at the medical clinic known as H.I.N. or Centro Medico.

SUMMARY OF THE ARGUMENTS

- A. The Appellant did not receive a fair trial.
 1. Judge Brieant belittled, badgered and hurried defense counsel throughout the proceedings, making it especially difficult to conduct thoughtful cross-examination and thus, violating the defendant's right to a fair trial, due process of law and effective assistance of counsel. He did not, as stated by the panel, take a "no-nonsense approach"

to the trial; Judge Brieant was biased, one-sided and obviously favored conviction.

2. The trial judge also allowed evidence that the Appellant paid Medicare \$8,000.00 in settlement of a civil matter. The issues were confused and the jury inflamed by this highly prejudicial testimony.

- B. The indictment should be set aside and the conviction reversed because the transcript of the Grand Jury proceedings did not reveal any instruction regarding the right of members to call witnesses rather than rely on hearsay. Moreover, it is not clear the proper instruction was administered off the record as claimed by the Government.

Argument I

THE TRIAL COURT ERRED IN REPEATEDLY HURRYING,
BELITTling AND BADGERING DEFENSE COUNSEL,
THEREBY DEPRIVING THE APPELLANT OF A FAIR
AND IMPARTIAL TRIAL AND DUE PROCESS OF LAW.

During the course of this trial the District Judge repeatedly hurried, belittled and badgered defense counsel, both in the presence of the jury and at the bar.^{1/} Judge Briant's impatience and intemperance created an atmosphere that denied Appellant a fair trial and due process of law and the conviction must be reversed. United States v. Coke, 339 F2d 183, 185 (2d Cir. 1964), Young v. United States, 346 F2d 793 (D. C. Cir. 1965), Sunderland v. United States, 19 F2d 202 (8th Cir. 1927).

The cross-examination of every important government witness was punctuated by severe instructions to defense counsel by the judge that hurried and demeaned him and abbreviated his questioning. During the cross-examination of the Government's lead witness (where critical first impressions are created) defense counsel attempted to establish that Medicaid claims were often fraudulent -- obviously because Medicaid recipients were to testify against the Appellant. The court mildly rebuked defense counsel at

^{1/} Comments by the court in the presence of the jury will be denoted in transcript references by "j".

first, indicating that such fraud was common knowledge (Tr. 43, j). However, after allowing counsel to cross-examine further he abruptly cut him off, saying, "We don't have to go any further than that. Everybody knows this takes place. Let's go on to this trial. Let's talk about this case." (Tr. 43-44, j).

Immediately thereafter counsel attempted to lay a predicate to introduce a certain letter, which caused the judge to snap, "If you have a letter mark it for identification. Offer it in evidence. I can't waste time with this folderol that has nothing to do with the case." (emphasis added) (Tr. 45, j). Ironically the letter -- the irrelevant "folderol" -- and an additional document were then admitted into evidence, over the objection of the prosecutor (Tr. 46). Defense counsel then attempted to question the witness from the letter:

Q Was the New York City Department of Social Services required or requested to provide information as to medical treatment for various Medicaid patients and particularly in response to Government's Exhibits 1 through 28, the persons listed there?

A Yes.

Q Was the response of the City of New York that they could not do so? (Tr. 46).

The court immediately escalated his attack:

THE COURT: Is that what the letter says?
Isn't it?

MR. GRUNEWALD: Yes, sir.

THE COURT: That has been covered. You did not have to do it twice. You can read the letter to the jury at the proper time. Do not waste time. Cross examine this witness and send him home.

MR. GRUNEWALD: I will get to the question. I want to be as quick as possible.

THE COURT: All right, let's go. The letter is in evidence. (Tr. 46-47).

The trial judge seemingly could not issue gentle reproach; rather he continued his intemperate remarks, sometimes after objections, sometimes sua sponte. Defense counsel continued his questioning:

Q On a prior occasion, Mr. Sternberg, did I request that you try to locate certain prescriptions in connection with Dr. Buthorn, do you recall?

A Yes.

Q And these were prescriptions that were submitted in connection with services rendered?

MR. WILSON: Objection to this form of question. Counsel is testifying.

THE COURT: Yes, I will sustain the objection to the form.

Q Did I ask that you try to locate prescriptions?

A Yes.

THE COURT: Never mind what you asked. The question is does he have any prescriptions or doesn't he? That is the question. If you want him to produce prescriptions ask him if he has any. He can tell you whether he has them or not. (Tr. 54).

During the cross-examination of another witness, one Comacho, Judge Brieant interrupted (Tr. 181-185) to attack the intelligence and competence of defense counsel:

THE COURT: Why is it we are having these tremendous pauses? Why is it we are having every answer repeated? Not just the good answers. I don't mind tactics. If a lawyer wants to take a good answer and repeat it so as to make sure the witness' answer is heard by the jury, that is commonplace, but you must not do it with every single answer. You are getting a tremendous time lag between answers. You are not paying attention to my directions and rulings, and you are being repetitious, and you've tried this case once so it ought to be very easy; it ought to be like rolling off a log. (Tr. 182).

He concluded his remarks by saying

Please let's not have this lengthy delay. If you want to show the jury that her recollection is poor, the way to confront her is to frame your questions one after another, and you sit there thinking and having -- or having a private seance with yourself wasting my time on a case you tried once. You ought to be ready. It's ridiculous. (Tr. 184).

After limiting cross-examination of Comacho (Tr. 189) and denigrating counsel's competence (Tr. 192), Judge Brieant indicated counsel was insulting the jury's intelligence and wasting their time (Tr. 198, j). While examining another government witness the judge told defense counsel, "Look, I'm not going to have speeches to the witness. I've told you that several times. She is not concerned with what you want, and you are not to tell her what you want. Just try the case." (Tr. 293).

The record is replete with the trial judge's ascerbic, contradictory and unwarranted remarks^{2/} made primarily before the jury. Appellate courts have consistently deplored such intemperate conduct, recognizing a litany of resultant dangers, such as unnerving defense counsel, prejudicing the jury and contaminating the impartial atmosphere of the trial. Clearly Judge Brieant's conduct was inconsistent with the well settled principle that the District Judge's fundamental duty is to ensure that "...the entire trial will be conducted in a general atmosphere of impartiality." United States v. Cassagnol, 420 F2d 868, 878 (4th Cir. 1970). See also United States v. Cole, 491 F2d 1276 (4th Cir. 1974); Young v. United States, 346 F2d 793 (D. C. Cir. 1965); United States v. Coke, 339 F2d 183, 185 (2d Cir. 1964); United States v. Kelly, 314 F2d 461 (6th Cir. 1963). The conviction should be reversed.

^{2/} These references include, but are not limited to, Tr. 116-118; 345-6; 358-9; 362, j; 364, j; 365, j; 370-1, j; 404, j; 445, j; 448-451, j; 452, j; 454, j; 455-6, j; 473, j; 494-7, j; 449, j; 559, j; 562, j; 578-9, j.

Argument II

THE TRIAL COURT ERRED BY ALLOWING IMPEACHMENT
OF THE APPELLANT WITH EVIDENCE OF A CIVIL
SETTLEMENT OF A MEDICARE CLAIM AGAINST HIM,
WHICH SERVED ONLY TO PREJUDICE AND CONFUSE
THE JURY

Appellant testified that he had thrown away certain records in 1975 related to the treatment of his patients in 1971 at the medical clinic in question. (Tr. 863).

It was later developed these records were thrown away at a time when Appellant was not under investigation (Tr. 936). The prosecutor attempted to cross-examine on the Appellant's ability to properly document his treatment: "Dr. Buthorn, it is a fact, is it not, that you had some difficulties in documenting some of your treatment on some of your other Medicare patients? Is that correct?" (Tr. 863).

Appellant answered "No" (Tr. 863) but the Court apparently agreed the question was irrelevant (Tr. 864). The prosecutor's justification for the question was that he would:

. . . like to develop the line that he [Appellant] had a great deal of trouble in the summer of '72 and into '73 with Medicare in documenting certain treatments he had claimed for, and that trouble resulted in him paying back Medicare eight thousand dollars.

We are suggesting that this dispute was any criminal activity on the part of

Dr. Buthorn. Medicare had a difference of opinion with Dr. Buthorn concerning whether or not the treatments he was giving were treatments covered by Medicare." (Tr. 864-5).

The judge's response was correct:

THE COURT: Why wouldn't it be criminal? You see the difficulty --" (Tr. 865).

The prosecutor persisted:

MR. WILSON: I will give him [Appellant] the benefit of the doubt.

Let me explain, your Honor. He had a great deal of trouble with Medicare to the extent of paying back eight thousand dollars. Now after being burned for eight thousand dollars in 1973, destroying records in 1975 would be the last thing a reasonable man would do, and this goes directly to his credibility. (emphasis added)

THE COURT: The difficulty with it is that it implies to the jury that he committed a prior crime which was similar to this one, and I don't know how you can --

MR. WILSON: To ask a witness --

THE COURT: Please, Mr. Wilson, let me finish. It is highly prejudicial and not very probative of anything.

You see, this is an unusual case. He has not testified he made a mistake or that he had careless records or that his secretary filled out the records wrong and it was billed by inadvertance or negligence or something like that. This man has flatly testified under oath before me in this trial that every one of these treatments for which he billed had been rendered. Maybe you didn't hear it. (Tr. 865).

Judge Brieant emphasized at least four more times that the probative value of such evidence was overwhelmed by the implication that Appellant's civil settlement was a criminal act. (Tr. 866, 867, 869, 871).

After redirect of Appellant, the entirety of which is set out herein, the judge changed his decision completely.

REDIRECT EXAMINATION

BY MR. GRUNEWALD:

Q Dr. Buthorn, can you tell us the difference between in-patient and out-patient?

A Yes. It's a term that refers to a patient -- to patients who are residing in a facility, such as a nursing home or hospital. That is termed an in-patient.

People who are taken care of almost anywhere else, whether it be in a physician's office or in fact a clinic at the hospital, these are termed out-patients.

An out-patient comes, receives care from a physician and leaves.

Q Now, in connection with in-patient treatment, a hospital facility or something of that nature, are there generally nurses there?

A Yes, there are.

Q In the case of out-patient facilities, and in particular, let's go to the clinic in 1971, the Centro Medico Clinic, did you have any nurses there?

A No, I didn't.

Q Was that in-patient or out-patient type of treatment?

A That is an out-patient kind of treatment.

Q With respect to the keeping of records, are there any directives from Medicaid with respect to how you must keep records and for how long a period of time, or anything of that nature?

A No, there is no obligation at all.

Q Since you were asked the questions with respect to Medicare, is there the same rule or what?

A There are no directives. In fact, if you make a request from Medicare as to receive directives as to what they want, they will simply say that it is illegal for Medicare to give out directives as to the administrative care of individuals.

Q With respect to the card records that you initially kept for a few months in 1971, was there anything on those card records that would be substantially different than what was on the invoices themselves?

A No, there would not be.

Q When in or about 1975 -- you told us you were clearing out your office and some things were thrown out.

Was that the only thing that was thrown out at the time?

A No, there were a great deal of things thrown out of the office.

Q The card records, for what period of time were these, as best you can recall?

A The card records were the beginning of 1971.

Q Did you keep anything which reflected the same information that was on those few card records?

A Yes, I did. I kept the pink sheets of my invoices filed with New York State.

Q At the time time that you cleaned out your office, at that time were you indicted or even accused of the charges in this indictment?

A No, I was not. (Tr. 934-6).

Over timely objection of defense counsel (Tr. 937) the prosecutor was allowed to develop the hitherto condemned evidence. The theory of the Court was: (1) that redirect had opened the door (Tr. 937); 2) that the evidence, only moments before a criminal act, was now merely civil in nature (Tr. 942); and (3) an almost incomprehensible statement by the Court that "This particular line of inquiry is being permitted for a very limited purpose only, and that is to assist the jurors in considering the credibility of this witness as to his testimony that he threw out or destroyed cards or records in the HIN Clinic for services rendered in 1971. That is all." (Tr. 945).

The Court abused its discretion by allowing evidence of the civil settlement, which he repeatedly acknowledged was prejudicial and probative of very little (Tr. 865). Rule 403,

F. R. Cr. P. Moreover, the Court acknowledged that the evidence of the settlement was not a "similar act" and was merely rebuttal (Tr. 1051), thus the only effect of the evidence was to inflame the jury by creating the impression that Appellant had a criminal character and predisposition to commit the crimes alleged. This type of conviction by character assassination has been condemned by all courts. Although the type of impeachment differed somewhat, the general principle was stated in Boyd v. U. S., 142 U. S. 450, 458 (1982):

Those robberies may have been committed by the defendants in March, and yet they may be innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue . . .

See also United States v. Davenport, 449 F2d 696 (5th Cir. 1971).

Argument III

THE INDICTMENT SHOULD BE DISMISSED BECAUSE
THE TRANSCRIPT OF TESTIMONY BEFORE THE GRAND
JURY DOES NOT REVEAL ANY INSTRUCTION THAT ITS
MEMBERS COULD SUBPOENA WITNESSES WHO HAD FIRST-
HAND KNOWLEDGE

The transcript of testimony before the Grand Jury does not reveal any instruction that it might subpoena witnesses who had firsthand knowledge of the facts concerning Appellant. After timely motion by defense counsel, Judge Brieant asked the prosecutor:

THE COURT: Can you show me within the terms of the Estepa case that the Grand Jury was told in effect that if they wanted to demand the presence of Camacho and Diaz and Fogg and Galarza [witnesses], and so forth, rather than taking testimony of Miss Rina Morey [agent] that they might do so?

MR. WILSON: Your Honor, I don't think it is in that transcript. I don't recall if I gave them a warning off the record. (Tr. 640).

The prosecutor responded by introducing an affidavit of the prosecutor who handled the Grand Jury that apparently indicted Appellant (Appendix, affidavit of JoAnn Harris). However, that affidavit is vague; it never specifies that the Grand Jury which indicted Appellant was instructed about its right of subpoena.

Assuming the affidavit was sufficient to reveal that proper instructions were given, it is urged nevertheless that the potential for prosecutorial abuse such as that recounted in

Estepa v. United States, 471 F2d 1132, 1137 (2d Cir. 1972) will never be eliminated until the U. S. Attorney and his her assistants give those instructions on the record so that the transcript reveals exactly what was said.

Appellant may not have been indicted if the Grand Jury had called some of the witnesses who appeared at trial and this Court has no way of ascertaining whether its members wanted to call them or knew that they could. Estepa, supra.

CONCLUSION

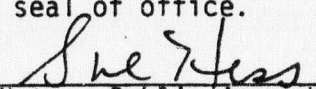
For the reasons set forth above, under Arguments I and II Appellant's conviction should be reversed and remanded; under Argument III the indictment should be dismissed and the conviction reversed, or in the alternative under Argument III the case should be remanded for further hearing.

CERTIFICATE OF SERVICE

I, DAVID H. BERG, do hereby certify that on the 31st day of August, 1977, a true and correct copy of Appellant's Petition For Rehearing In Banc was served by sending the same to Mr. Robert B. Fisk, Jr., United States Attorney For The Southern District Of New York to the attention of the Hon. Patricia Anne Williams, Assistant United States Attorney For The Southern District Of New York at United States Courthouse Annex, 1 St. Andrew's Plaza, New York, New York 10007 by certified U. S. Mail.

DAVID H. BERG
Attorney In Charge For Appellant

Sworn and Subscribed to this 31st day of August, 1977 to certify which witness my hand and seal of office.



Notary Public in and for
Harris County, T E X A S

STATUTES

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false, fictitious or fraudulent statement or entry, shall be fined no more than \$10,000/5 years.

Title 18 U.S.C. § 1001

Whoever wilfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 U.S.C. § 2(b)